

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP828-CR

Cir. Ct. No. 2005CF82

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL SANCHEZ, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Portage County: THOMAS T. FLUGAUR, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Daniel Sanchez appeals his conviction of intimidating a witness in violation of WIS. STAT. § 940.42. Specifically, Sanchez

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

contends that the evidence presented at trial was legally insufficient to warrant a finding of guilt by the jury. We disagree and affirm.

BACKGROUND

¶2 The following facts are taken from the record and represent the evidence viewed in the light most favorable to the verdict. On April 13, 2005, Eric Dunigan was waiting in a Portage County courthouse room to be called to testify at trial against Jesus Solis. The State secured Dunigan's presence by subpoena, which ordered him to be available the week of April 11-15, 2005. During his wait at the courthouse on the date the State summoned him to testify, Dunigan made the acquaintance of another man, Steven Solis. Dunigan and Solis,² a relative of Jesus, talked collegially and eventually exchanged phone numbers. Despite having summoned him, the State never called Dunigan to testify at Jesus' trial.

¶3 Several days later, Solis invited Dunigan to attend a party in Wisconsin Rapids. On the evening of April 16, 2005, Solis picked up Dunigan in the Stevens Point area and drove him to the house of Solis's cousin, Daniel Sanchez, who was throwing a birthday party for two of his children. According to Dunigan, Sanchez and Solis confronted him about whether Dunigan had "snitched on somebody, one of their family members." Shortly thereafter, and in Sanchez's presence, Solis grabbed Dunigan's right hand and slashed it with a large knife. Dunigan asked Solis why he cut him and Solis replied in Spanish, "because you're

² We note that there are three people with the last name "Solis" involved in this case: Jesus Solis, Jennifer Solis, and Steven Solis. We will refer to Jesus Solis as "Jesus," Jennifer Solis as "Jennifer," and Steven Solis as "Solis."

a rat.” Chad Lawrence, who was also at the party, witnessed Solis, Sanchez, and another man arguing with Dunigan before the slashing incident. Lawrence testified that he heard Dunigan being called a “narc,” which he described as a slang term for “snitch” or “tattletale.”

¶4 Seeking to leave the party and unable to arrange a ride back on his own, Dunigan accepted Sanchez’s offer to drive him back to the Stevens Point area. During the ride, Sanchez repeatedly hit him in the face while asking, “Are you a rat? Did you snitch on my family?” and stating, “my original job was to shoot you and put bullets in you.” On the way back to the Stevens Point area, Sanchez drove Dunigan to Jennifer’s apartment; Jennifer is Jesus’ wife. Sanchez questioned Jennifer about whether Dunigan had been involved in the trial against Jesus. After she told Sanchez that she did not know Dunigan, Sanchez took Dunigan to the house of one of Dunigan’s friends.

¶5 The State charged Sanchez with intimidation of a witness in violation of WIS. STAT. §§ 940.42 and 940.43(1).³ At trial, Dunigan was unresponsive to questions relating to Sanchez’s behavior toward him during the drive from Sanchez’s home to the Stevens Point area and testified that he was

³ WISCONSIN STAT. § 940.42 provides that the misdemeanor of intimidation of a witness is committed by one who “knowingly and maliciously prevents or dissuades, or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding, or inquiry authorized by law” WISCONSIN STAT. § 940.43 elevates the crime to a felony if accompanied by certain factors, but Sanchez was acquitted of this charge. Sanchez was also charged with battery of a witness in violation of WIS. STAT. § 940.201(2)(a). Sanchez was also acquitted on this count.

concerned for his safety if he testified against Sanchez.⁴ The jury found Sanchez guilty of intimidating a witness in violation of § 940.42. Sanchez appeals.

DISCUSSION

¶6 Sanchez argues that the evidence presented at trial was insufficient to support his conviction. Specifically, Sanchez argues that the evidence was legally insufficient to prove that he acted with the requisite intent to prevent or dissuade Dunigan from testifying against either Jesus or Solis in the future.⁵ Sanchez argues that the only evidence introduced at trial related to past, not potential future, testimony. Sanchez points to testimony indicating that he had asked Dunigan whether he *had* snitched on his family at Jesus' trial and whether Jennifer recognized Dunigan as someone who *appeared* at Jesus' trial. Sanchez also notes the absence of any mention by him that Dunigan might report the slicing of his hand to authorities or testify against Solis in any proceedings related to that incident. He argues that there is no evidence that he acted with the purpose of dissuading Dunigan from testifying or cooperating with a prosecution resulting from Solis's attack on him. While acknowledging Dunigan's unwillingness to testify against him at trial following the assault, Sanchez argues that a witness's fear is not an element of intimidation of a witness under WIS. STAT. § 940.42.

⁴ Dunigan refused to answer questions asked by the State even after the court directed him to do so. The court eventually declared Dunigan a hostile witness to the State.

⁵ We note that the jury was instructed to consider whether Sanchez acted with the purpose to dissuade or prevent Dunigan from participating or cooperating in the prosecution of the "assault upon him." Thus, the jury was allowed to consider the assaults upon Dunigan by both Solis and Sanchez.

¶7 The State counters that the evidence was legally sufficient to allow a reasonable jury to find that the State proved all three elements of the crime beyond a reasonable doubt. As to the first element, whether Dunigan is a witness, the State describes evidence establishing that Dunigan was a witness not only at Jesus' trial, but was also a witness to the attack against himself, which could be (and has been) the subject of future proceedings. The State points to evidence in the record establishing that Dunigan was subpoenaed to appear in proceedings against both Jesus and Solis, and that Dunigan was a witness in the trial against Sanchez. As to the second element, the State describes the evidence that Sanchez called Dunigan a rat and asked Jennifer whether Dunigan appeared at Jesus' trial as supporting the jury's finding that Sanchez attempted to dissuade Dunigan from attending or giving testimony at a proceeding authorized by law. As to the third element, the State points to Sanchez's threatening and aggressive manner toward Dunigan and his knowledge that Dunigan was a witness as supporting the jury's conclusion that Sanchez acted knowingly and maliciously.

¶8 The State further argues that this evidence supports the inference that Sanchez's conduct toward Dunigan would escalate if Dunigan ever provided testimony against Sanchez's family again. The State notes Dunigan's refusal to answer questions at trial as evidence that Sanchez's intimidation worked. We agree with the State.

¶9 When reviewing the sufficiency of the evidence to sustain a conviction, we apply a highly deferential test. *State v. Jensen*, 2000 WI 84, ¶23, 236 Wis. 2d 521, 613 N.W.2d 170. We will reverse a criminal conviction on grounds of insufficient evidence only if the evidence, when viewed most favorably to the verdict, "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt

beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). When faced with a record that supports more than one inference, we “must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law.” *Id.* at 506-07. Thus, a successful insufficiency of the evidence claim requires the defendant to carry a heavy burden. *State v. Searcy*, 2006 WI App 8, ¶22, 288 Wis. 2d 804, 709 N.W.2d 497.

¶10 Under WIS. STAT. § 940.42, in order to prove intimidation of a witness, the State must prove the existence of three elements:

(1) the victim was a witness ..., (2) the defendant prevented or dissuaded or attempted to prevent or dissuade the victim from attending or giving testimony at a proceeding authorized by law, and (3) the defendant acted knowingly and maliciously, which requires that the defendant knew the victim was a witness and that the defendant acted with the purpose to prevent the victim from attending or testifying.

See *State v. Cotton*, 2003 WI App 154, ¶18, 266 Wis. 2d 308, 668 N.W.2d 346.⁶

WISCONSIN STAT. § 940.41(3) defines “witness” for the purpose of WIS. STAT. § 940.42 in relevant part as

any natural person who has been or is expected to be summoned to testify; who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has as yet been commenced; ... or who has been served with a subpoena issued under s. 885.01 or under the authority of any court of this state or of the United States.

⁶ In *State v. Cotton*, 2003 WI App 154, ¶18, 266 Wis. 2d 308, 668 N.W.2d 346, we set forth the three main elements of intimidation of a witness in the context of a WIS. STAT. § 940.43 felony charge. The same elements apply to misdemeanor charges.

¶11 The jury received the following instructions:

Elements of the Crime That the State Must Prove

1. Eric Dunigan was a witness.

“Witness” means any natural person who by reason of having relevant information is subject to call or likely to be called as a witness, whether or not any action or proceeding has yet been commenced.

2. The defendant attempted to dissuade Eric Dunigan from attending or giving testimony at a proceeding authorized by law. Preliminary hearings and jury trials are authorized by law. Dissuade means to advise against or to turn from by persuasion.

3. The defendant acted knowingly and maliciously.

This requires that the defendant knew Eric Dunigan had relevant information regarding the assault upon him, and that the defendant acted with the purpose to dissuade Eric Dunigan from participating or cooperating in the prosecution of that crime.”

See also WIS JI—CRIMINAL 1292.

¶12 We conclude there was sufficient evidence supporting the jury’s verdict that Sanchez was guilty of intimidating a witness. First, there was sufficient evidence establishing that Dunigan was a witness, within the meaning of WIS. STAT. § 940.41(3), to the slicing of his hand by Solis and to the alleged battery by Sanchez against Dunigan. We observe that the statutory definition of “witness” is broad, which includes individuals who might be called at future proceedings not yet commenced. WIS. STAT. § 940.41(3). Applying this definition to the facts of this case, a reasonable juror could conclude that even as of the date of the attacks on him, Dunigan could be considered a “witness” against his assaulters, i.e., Solis and Sanchez, even though no action or proceedings had

yet commenced against them. In addition, the broad language of WIS. STAT. § 940.42 also appears to contain no restrictions precluding the jury from considering Dunigan's status as a witness at Jesus' trial to satisfy the first element of the charge. The statute prohibits intimidation of "a witness" from participating in "any trial, proceeding, or inquiry authorized by law," not just a trial related to the proceedings leading to his original classification as a witness. WIS. STAT. § 940.42.

¶13 As to the second and third elements, we conclude that the evidence was sufficient to support a finding by a reasonable jury that Sanchez knew Dunigan had relevant information regarding the violent attack upon him, and that Sanchez acted knowingly and maliciously with the purpose of dissuading Dunigan from participating or cooperating in the prosecution of that assault. Contrary to Sanchez's argument that all the evidence on record goes to Sanchez's knowledge of past (i.e., the Jesus trial), not future, proceedings in which Dunigan might be a witness, a jury could reasonably conclude that Sanchez was aware of the possibility of future proceedings. Such future proceedings could arise not just in the Jesus trial, but also in relation to future charges arising from the violent attacks on Dunigan, which Sanchez himself had witnessed and participated in. As the State notes, Sanchez was charged in this case as a habitual criminal, and a reasonable inference could be drawn that a habitual criminal is generally aware that violent attacks can result in criminal proceedings.

¶14 In addition, it is beyond contention that Sanchez knew Dunigan had knowledge of the assaults upon himself, since Sanchez was present at the knifing, was the perpetrator of the continued attacks on Dunigan in the car, and Dunigan was the victim. Further, the jury could reasonably infer from the evidence of Sanchez asking Dunigan "Are you a rat? Did you snitch on my family?" while

punching him and threatening to shoot him that Sanchez was warning Dunigan that anyone he considered a “rat” against his family was subject to future violent attacks. More specifically, the jury could have reasonably inferred from Sanchez’s language and violent attack that he was acting with knowing and malicious intent to dissuade Dunigan from participating in the prosecution of the assaults against him that occurred that day.

¶15 Finally, although actual intimidation is not an element of intimidation of a witness under WIS. STAT. § 940.42, we note that Dunigan’s apparent fear of testifying during the Sanchez trial indicates that he viewed the assault upon him as not just a one-time act of revenge, but also as a warning of possible future violent attacks on him if he “ratted” on the Solis/Sanchez family.

CONCLUSION

¶16 We conclude that there was sufficient evidence for a reasonable jury to conclude beyond a reasonable doubt that Sanchez acted with the intent to prevent or dissuade Dunigan from attending or giving testimony at a proceeding authorized by law, in violation of WIS. STAT. § 940.42. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

